

# Introduction to Arizona Water Rights

## *Basic Terms, Concepts & Processes*

Presented by:  
Lin Fehlmann



**San Pedro River - From Milepost 31 to the Redington Narrows**

# Objectives

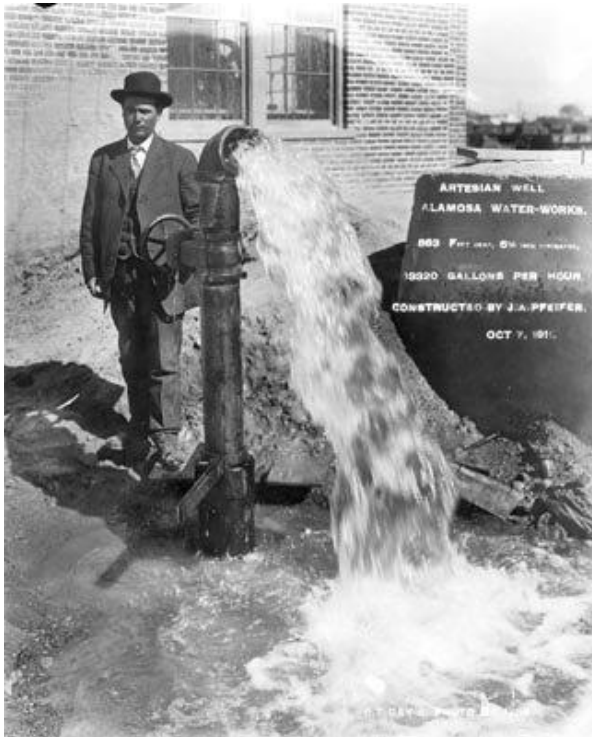
Given a proposed water use within Arizona, the participant will be able to:

- Identify the segments of Arizona water law and general application procedures that apply to the proposed use.
- Identify the major differences between a state-based right and a federal reserved water right.
- Identify how the proposed use would be administered within the Arizona water rights system.
- Identify how federal reserved water rights claims would be integrated within the Arizona water rights system.
- Identify how water rights would be addressed in land use planning documents.

# Water Rights Summary

A water right:

- Is the right to use water
- May be lost through nonuse
- Is real property - FLTFA



***A water right is freely transferable, assignable, and must be valued, inventoried and maintained.***

# Definition of a Water Right

## Right to use:

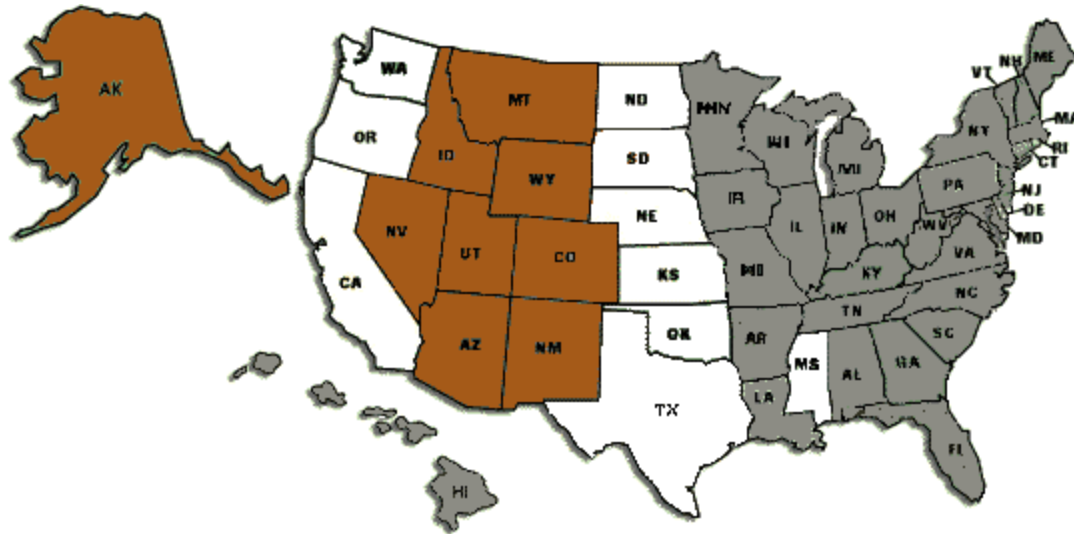
- Specific quantity (rate and amount)
- Available and unappropriated water
- From an identified source
- Diverted from a specific location
- Used at a specific place of use
- In priority
- For a beneficial use
- During an identified period of time
- Without waste

# Water Rights

## *Defined by State Law*

- **Water is the property of the State**
- **State determines:**
  - How the water right can be obtained
  - Steps required to obtain a water right
  - What uses of water are “beneficial”
  - What can be done once the water right is obtained
  - How ground and surface water will be integrated
- **Regulation of water rights and water use is defined by state statute, regulations, and policy**

# Water Law Doctrines in the U.S.



Grey – Riparian

Brown – Prior Appropriation

White - Hybrid

# *Appropriation Doctrine*

## *Permit System - Obtaining Water Rights*

- Most Western states use permit system to obtain water right  
(*e.g. AK, AZ, CA, ID, NM, NV, OR, UT and WY*)
- Some states use water court decrees to obtain water right  
(*e.g., CO*)

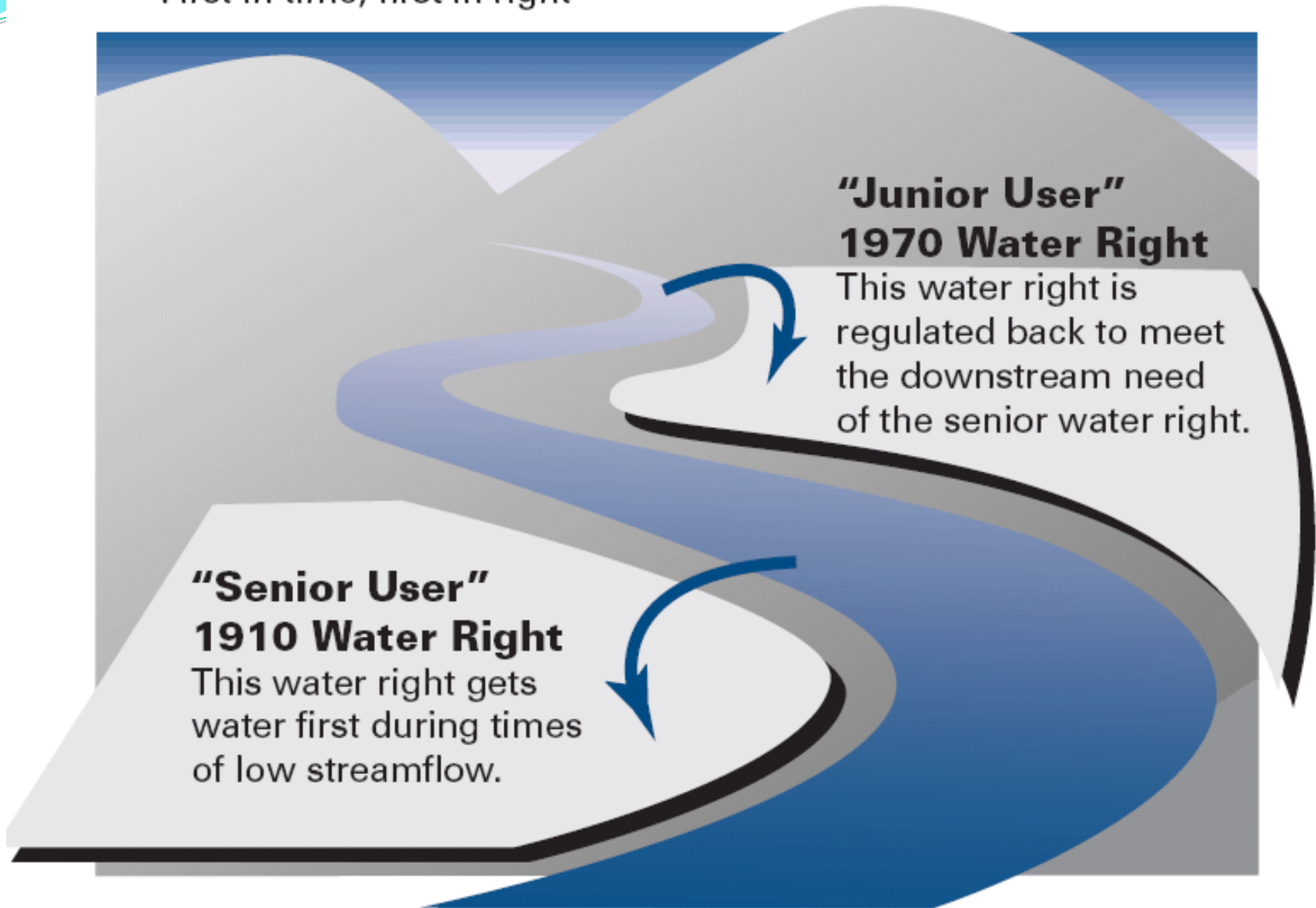
# Western States: *Prior Appropriation System*

- No shared use of water.
- “First in time is first in right.”
- Every water right has a priority date.  
*Earlier > senior      or      Later > junior*
- Earliest - entitled to water during when supply limited
- Right to use - independent from stream ownership
- Focus - physical diversion & water removal from streams
- Water must be used – nonuse can lead to forfeiture or loss of the water right.



## Prior Appropriation: an example

"First in time, first in right"



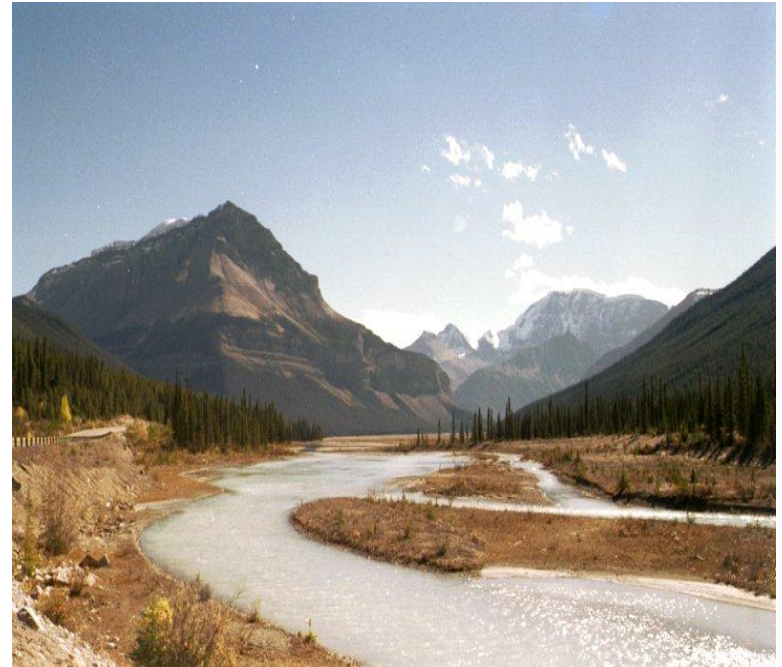
# Appropriative Water Right *Elements*

- **INTENT** to apply water to a beneficial use
- **DIVERSION** of the water from a natural stream
- An application of the water to a **BENEFICIAL USE**
- Assigned a **PRIORITY DATE**



# Consumptive v. Non-consumptive Use

- Consumptive Uses  
*(irrigation, livestock, domestic, industrial, mining)*
- Nonconsumptive Uses (Instream)  
*(fisheries, recreation, wildlife habitat, riparian health, water quality)*



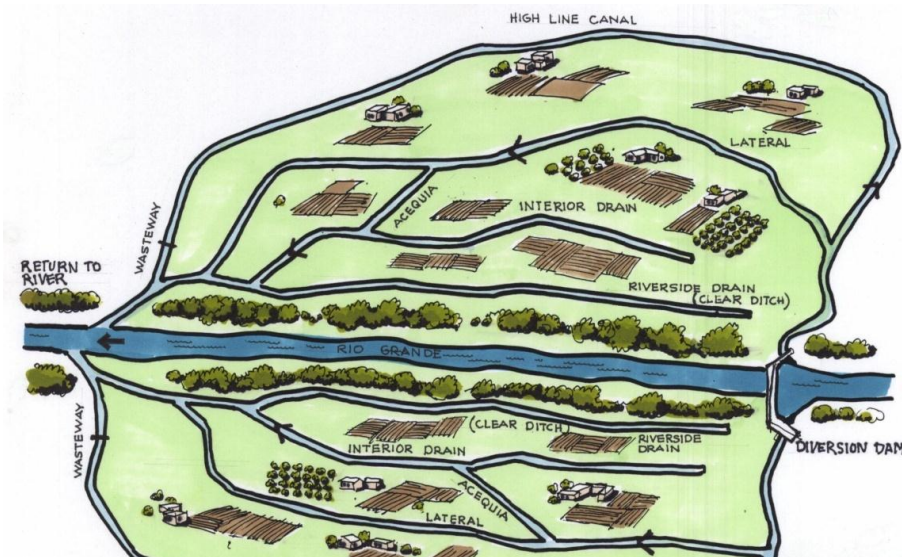
# Surface Water Rights *Types*

- Right to use water from springs, lakes, rivers, and streams.
- Distinctions: **DIRECT FLOW** and **STORAGE WATER**
- Storage & direct flow rights are
  - Integrated
  - Neither is given preference



# Surface Water Rights

## *Types (more)*



### **DIRECT FLOW**

Diversions for immediate use

Does not entitle the user to store any water.



### **STORAGE WATER RIGHTS**

Diversions for subsequent use.

Right to use stored water for any beneficial purpose.

# Groundwater Allocation Systems

- First groundwater rules based on land ownership (rule of capture),  
then  
“reasonable use or correlative rights”  
(riparian on its side)
- Most States regulate groundwater via:
  - Statutory regulation
  - Permit requirements
- Western states > prior appropriation  
plus
- Controlled / critical / designated areas



# Arizona Groundwater

- Managed separately from surface water, **not conjunctively**
- Wells classified either
  - “exempt” ( $\leq 35$  GPM) or
  - “non-exempt” ( $>35$  GPM)
- All wells must be permitted (or registered)
  - assigned a “55” number.
  - Permitted well is NOT a water right!
- New wells = Notice of Intent to Drill (NOI)
- Existing wells (drilled  $<$  June 12, 1980) = Late Registration
- Outside Active Management Areas  $>$  no groundwater rights



# AMAs & INAs

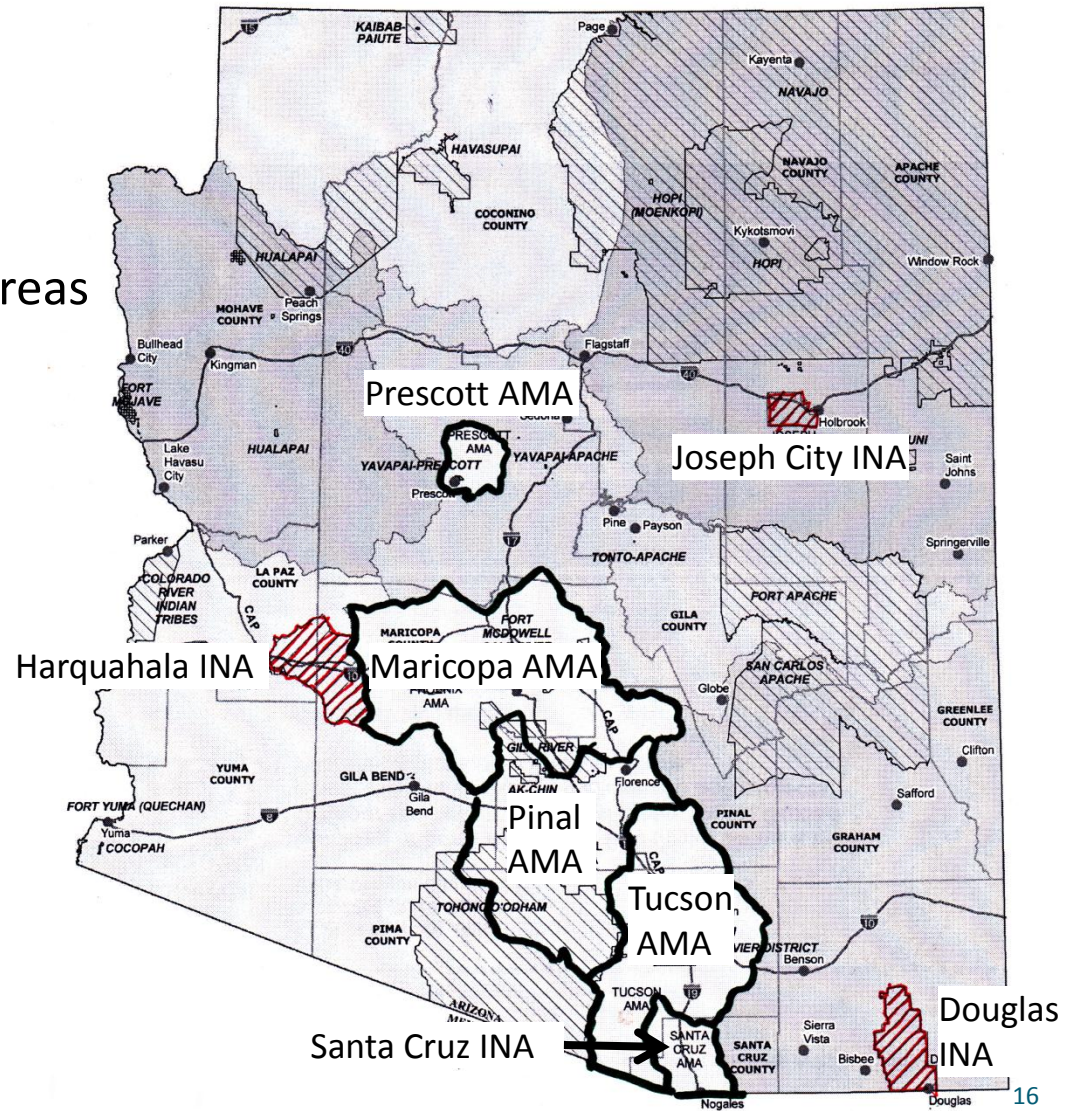
## Active Management Areas and Irrigation Non-Expansion Areas



Irrigation Non-Expansion Areas  
(INAs)



Active Management Areas  
(AMA)





# Loss of Water Right

## *Forfeiture and Abandonment*

### **Forfeiture**

- Loss due to some fault or negligence by holder

### **Abandonment**

- Loss due to water right not used for 4 or 5 successive years
- Must be voluntarily surrendered or relinquished
- Intent to abandon must be proved

# Permit System

## *Obtaining Water Rights*

A permit will generally be approved if:

1. Applicant follows prescribed procedures;
2. State authority determines that there is unappropriated water available;
3. Appropriation does not harm the public welfare or senior water rights.

# Permit System

## *Obtaining Water Rights*

### **“Vested” Water Rights**

- ❑ Historic use that continues to present day
- ❑ Use began before state water code passed
- ❑ Use restricted to amount of water historically diverted & used
- ❑ Typically claimed in adjudications, where right is confirmed or challenged
- ❑ Permit application needed to change it

# Latest Date for Establishing Water Rights

## BY Historic & Continuous Use (Vested Rights)

### IN Prior Appropriation States

State	Surface Water Use	Groundwater Use
Alaska	1966	1966
Arizona	1919 (1995)	Not Applicable
California	1914	Not Applicable
Colorado	1969	1972
Idaho	1971	1963
Montana	1973	1961
Nevada	1913	1939
New Mexico	1907	1931
North Dakota	*No vested date	Not Applicable
Oregon	1909	1955
South Dakota	1955	1978
Utah	1903	1935
Washington	1917	1945
Wyoming	1890	1945

# Permitting Process

## *Major Steps*

1. File an application with the state
2. Post a notice
3. Permit is issued with terms and conditions
4. The user is required to submit proof of completion
5. Certificate or license is issued

# Permit Application Process

## Department Review

The Department reviews the application to determine if water is available during the time requested and the proposed use is allowed.

The "Proposed Final Order" explains the findings of the Initial Review and whether the Department plans to approve or deny the permit.

This becomes the permit to use water. Now the applicant must begin to put the water to beneficial use.

**Initial Review**

**Proposed Final Order**

**Final Order**

## Applicant/Public Involvement

**Report**

A report is sent to the applicant

**Public Notice**

A weekly listing is sent to interested parties

**Protests**

If anyone opposes the proposed order, they may file a formal protest

**Contested Case**

This is to judge legal disputes if the protest cannot be resolved

**REVISED**

**CERTIFICATE OF WATER RIGHT**

Application No. A-2669.0004

**STATE OF ARIZONA**

County of Yavapai

(For conveyance of water rights perfected under Title 45,  
Chapter 1, Article 5, Arizona Revised Statutes)

**This is to Certify, That** the United States, on behalf of the United States, and present and future permittees, lessees, or allottees, c/o the Bureau of Land Management, Phoenix District Office, Phoenix, Arizona,

(hereafter referred to as "transferee," whether one or more) has made proof to the satisfaction of the Arizona Department of Water Resources that the interest of the State of Arizona, Phoenix, Arizona,

in a right to the use of the water of Dripping Springs Number Two Drain, a tributary to Dripping Springs Wash, a tributary to the Agua Fria River,

under Revised Certificate of Water Right Number 2874.0000 issued pursuant to Title 45, Chapter 1, Article 5, Arizona Revised Statutes, for the purpose or uses of stockwatering,

with a date of priority of July 19, 1944 has been conveyed to transferee.

The amount of water to which transferee is entitled is limited to an amount beneficially used, but shall not exceed 182,500 gallons per annum for stockwatering.

The land to which a right for a stockwatering purpose is appurtenant, in whole or in part, or on which a right for other purposes shall be used and the point of diversion are described as being within the Northwest quarter of the Northeast quarter (NW $\frac{1}{4}$ NE $\frac{1}{4}$ ), Section 30, Township 11 North, Range 2 East, Gila and Salt River Base and Meridian, Yavapai County, Arizona .

The right to the uses of the water whose conveyance to transferee is hereby acknowledged is restricted to the purposes and to the land described in this certificate and is subject to all prior existing water rights. If the right assigned was perfected under Title 45, Chapter 1, Article 5, Arizona Revised Statutes, the right is also subject to all water rights described in Section 45-272, Subsection B, Arizona Revised Statutes. Transferee takes the right subject to any forfeiture or abandonment of the water right, in whole or in part, by previous holders of the water right.

Revised Certificate No. 2874.0002 is granted this 3rd day of February, 1995.



Rita P. Pearson, Director

# Permitting Process

## *Changes and Amendments*

- ❖ Most states allow short-term & long-term changes to existing water rights.

*No short-term permits or changes in Arizona*

- ❖ Amendments to existing & “vested” water rights can occur but require submission of a change application.
- ❖ Applications for changes follow the same process as applications for new water rights.



# Permitting Process *Changes*

## Changes can be granted for:

- Permanent changes to water rights
- Temporary changes to water rights (*not in AZ*)
- Conversion of traditional water rights to instream flow water rights (*e.g., AZ, CO, MT, OR*)



# Permitting Process *Changes*

## **Standards for review of applications:**

- No injury to existing senior or junior water rights including vested rights
- No expansion of historic use
- Right to be changed is not subject to forfeiture or abandonment
- Net benefit to the stream environment

# Permitting Process *Changes*

## **Water rights elements that can be changed:**

- Point of diversion
- Means of diversion
- Place of use
- Type of use
- Time of use
- Volume/rate of water used

# Water Right Assignment/Conveyance

- Most states assume that all **appurtenant water rights automatically transfer with a change in land ownership**, unless expressly stated otherwise in the deed.  
*(except Colorado)*
- All western states have **notification process** to change or assign ownership of water rights when land transfers.  
*(except Colorado)*
- **A MUST** - update ownership in order to receive important notices from the state.

# Water Right - Arizona Assignment/Conveyance

**Arizona specific processes & forms for:**

- ☐ Assignment/conveyance of all surface water rights & claims
- ☐ Change of well ownership
- ☐ Assignment of adjudication claims



# A unique water right issue for Federal Agencies



## Reserved Water Rights

# Federal Reserved Water Right

- **Right created**
  - ❑ When federal land is reserved from public domain
  - ❑ Water needed for primary purposes of specific reservation
  - ❑ Express versus implied reservation language
- **Amount of water reserved**
  - ❑ Minimum amount needed to fulfill primary purpose(s)
- **Beneficial uses**
  - ❑ Includes future uses, ground water and instream flows
- **Federal reserved rights *not* subject to state law**
  - ❑ Cannot be lost (abandoned or forfeited) for not using for a beneficial use
- **Priority date is date the reservation was created**

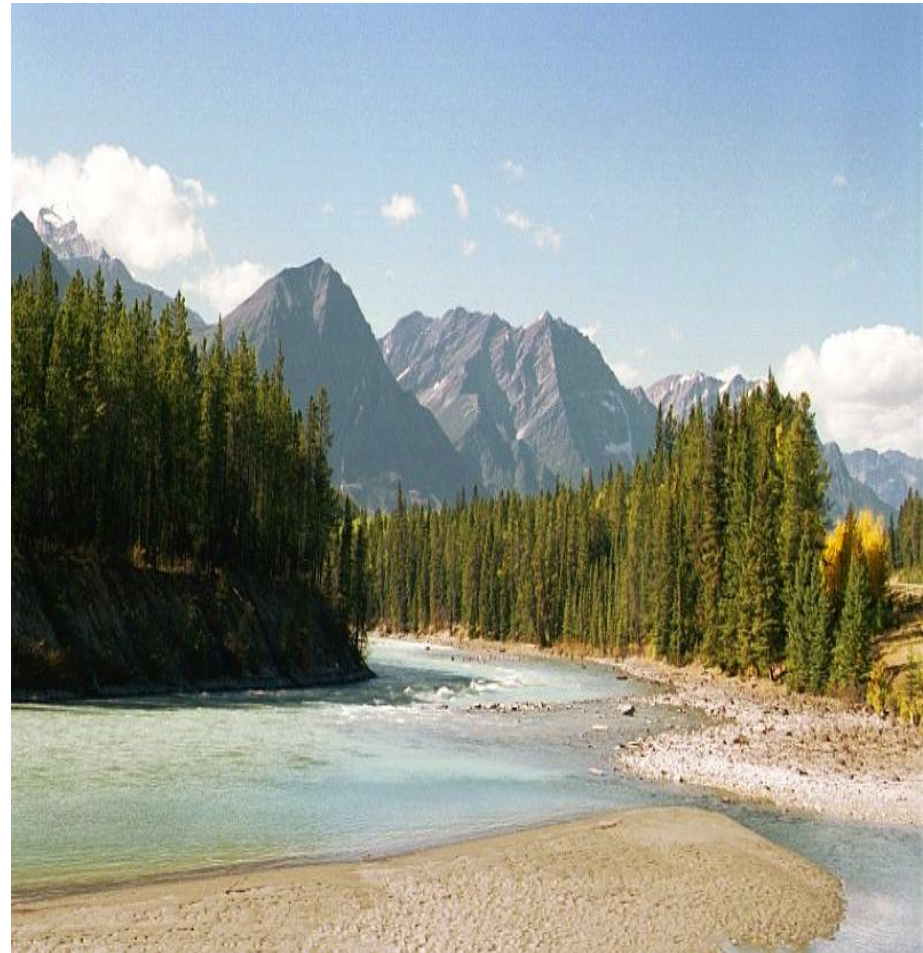
# Reserved vs State Appropriative Rights

	Federal Reserved Rights	State Appropriative Rights
<b>Basis</b>	Based on a Congressional reservation of land, presidential proclamation or executive order for a specific purpose.	Based on state law created by the state legislature.
<b>Controlling Purposes</b>	Federal law & purpose control the water right.	State law & purpose control the water right.
<b>Processes</b>	May be obtained in federal court; by adjudication in state court; or by settlement/ agreement with the state.	State legislation controls who may obtain the right and how it is adjudicated/permitted.
<b>Uses</b>	Uses are based on the purpose of the reservation.	State law controls what uses are considered beneficial.
<b>Forfeiture</b>	Federal reserved rights are not lost through nonuse.	State appropriative rights are generally lost through nonuse.
<b>Priority Date</b>	Date of reservation or designation.	Date the water is put to beneficial use or the date a permit application is submitted.



# Federal Reserved Water Rights *Assertion*

Most reserved water right claims are being made by federal agencies in state-initiated adjudications



# Water Adjudication

## *Description*



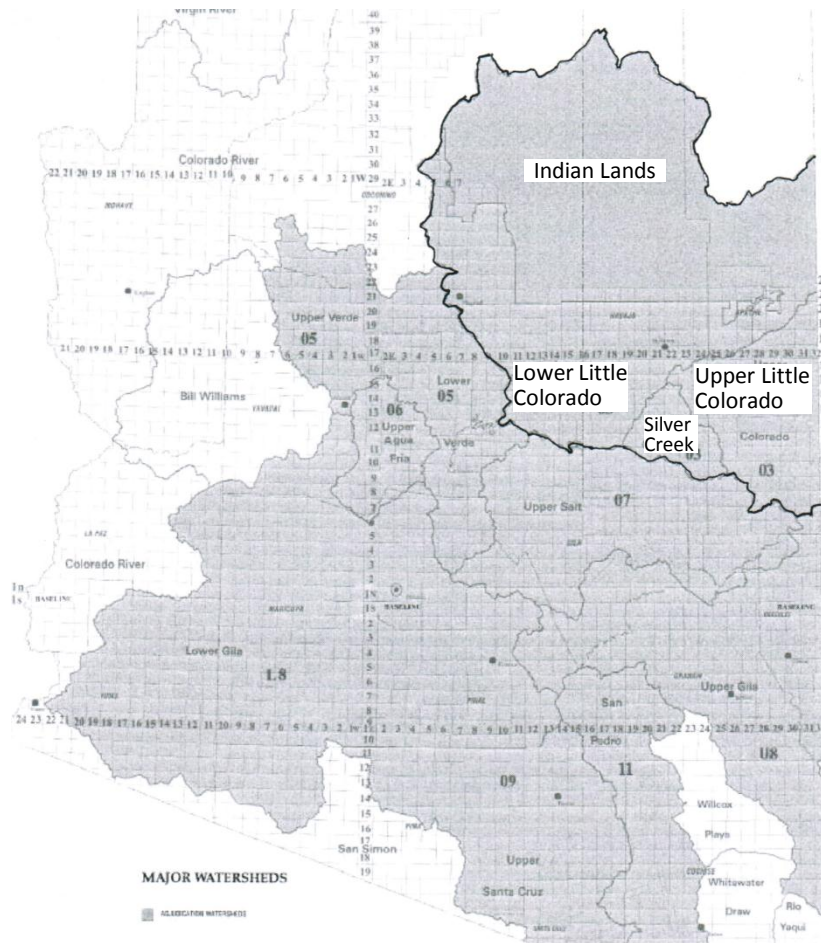
**Judicial proceeding determines water rights on a specified stream system**

- Usually includes:
  - ☐ All claims for vested water rights
  - ☐ All federal reserved water rights
  - ☐ Sometimes - rights established by permit.
- Adjudicated - holder has certainty of priority & value of water right compared to other rights on stream/watershed.

# Water Adjudication *Elements*

- Can be between 2 or more users, or for all users
- Public notice asks all water users to submit claims
- State administrative agency issues
  - Proposed orders, or
  - Determinations, or
  - Decree
- Water users may protest and request hearings
- Court enters final decree

# Little Colorado River & Gila River System & Source General Stream Adjudications



# Gila River System & Source General Stream Adjudication



# Water Adjudication

## *Federal Agencies' Participation*

- State must formally “join” the federal government under the McCarran Amendment
- Adjudication must be “comprehensive”  
*(include all water users on the stream system)*
- Federal claims processed under state procedures, but under applicable federal laws



# Instream Flow Water Rights Unique Concepts & Processes



# Traditional versus Instream Flow Water Right

## Traditional

- Remove water from stream
- Uses occur outside the stream channel

## Instream Flow

- Leave water in stream
- Uses occur in stream  
**and/or**
- Resource values dependent upon water in stream

# Instream Flow Water Rights

## *Priority Date*

### Traditional

- Included in prior appropriation system
- May or may not have a junior priority date

### Instream Flow

- Same
- Typically has a junior priority date
- Does not guarantee a “wet” stream



# Instream Flow Water Rights *Uses*

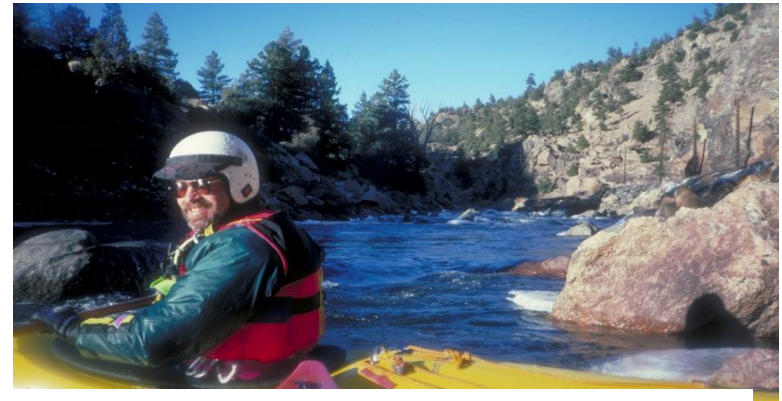
## Traditional:

Irrigation

Domestic

Livestock

Industrial



## Instream Flow:

Fisheries

Recreation

Wildlife Habitat

Riparian Health

Water Quality

# Instream Flow Water Rights

## *Location & Quantity*

### Traditional:

- Location:**
- Point of Diversion
  - Based on season or period of use

- Quantity:**
- Max diversion rate
  - Limited to amount needed for beneficial use

### Instream Flow:

- Stream Reach (begin & end points)
  - Year-round use
- Quantity:**
- Based on Flow Rate
  - Depends on resource needs – can vary by day, month, season, etc.

# Instream Flow Water Rights - Arizona

- Individual, corporation or government can apply
- Uses limited to wildlife, including fish, & recreation
- Priority date is application date
- Application must be supported by:
  - 5 years of hydrologic data
  - Documentation of stream-dependent values
- Must comply with ADWR review procedures

# What's the Difference?

## Federal Reserved Instream Flow Rights Versus State-Based Instream Flow Rights





# Federal ISF Rights v. State ISF Rights

- Basis
- Controlling Purposes
- Processes
- Uses
- Forfeiture
- Priority Date



# Federal ISF Rights v. State ISF Rights

## Example:

*BLM Reserved Right for San Pedro River* – priority is date of creation (11-18-88), federal purposes claimed in SPRNCA designation (PL 100-696), quantified through San Pedro Adjudication process

V.

*BLM Certificated Instream Flow Right for San Pedro River* – priority date of 08-12-85, for wildlife inc. fish & recreation uses, AZ state application/permit/certification process

# Water Rights & Land Use Planning Process

In the planning document, identify:

- Characteristics of water resources
- Present and future water uses and demands
- Legal availability of water
- Water rights held by federal agency (both state-based and federal reserved rights)
- Agency water needs
- Management actions to protect and maintain water supplies and natural flows



# BLM Claims – San Pedro Adjudication/Watershed

- **State-based Water Rights**

- Surface rights (applications, permits, certificates, stockpond claims, vested or pre-1919 claims) for springs, ponds and instream flows
- Well permits (but no groundwater rights) for wells

- **Federal Reserved Water Rights**

- San Pedro Riparian National Conservation Area (SPRNCA) – priority date of November 18, 1988.
- Needles Eye Wilderness Area – priority date of November 28, 1990.
- Public Water Reserve No. 107 – priority date of April 17, 1926.

# Conclusion

## Water Rights and the San Pedro Riparian National Conservation Area RMP Effort

- Arizona state-based water rights
- Federal reserved water rights
- Differences between state-based and federal rights
  - Beneficial uses; future uses
  - Forfeiture; nonuse
  - Groundwater protection
  - Priority date
- How water rights are addressed in planning efforts